

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA**

UNITED STATES OF AMERICA,

Plaintiff,

VS.

MITCHELL L. SCHULTZ,

Defendant.

CASE NO. 8:08CR481

TENTATIVE FINDINGS

The Court has received the Revised Presentence Investigation Report (“Revised PSR”), the Defendant’s objections to the original Presentence Investigation Report (“PSR”) (Filing No. 42), and the Defendant’s motion for variance (Filing No. 36). The government adopted the PSR (Filing No. 38). See Order on Sentencing Schedule, ¶ 6. The Court advises the parties that these Tentative Findings are issued with the understanding that, pursuant to *United States v. Booker*, 543 U.S. 220 (2005), the sentencing guidelines are advisory.

Objections

The objections to ¶¶ 11, 13, 22, 52, 56, 59, 61, 63, 64, 65, and 67¹ are denied. These objections are moot, as the information supplied in these objections has been incorporated in the Revised PSR.

The Defendant also objects to ¶¶ 29-34² (base offense level and all enhancements). The objections to ¶¶ 29 and 30 (base offense level; material involving prepubescent minors) are denied, as no bases for these objections were stated. The objection to ¶ 31

¹These paragraph numbers are from the original PSR. The numbers vary somewhat in the Revised PSR.

²These are the paragraph numbers reflected in the Revised PSR.

(distribution of the receipt or expected receipt of a thing of value other than pecuniary gain) will be heard. The Defendant states that he did not distribute any images; however, he pleaded guilty to Count I of the Indictment charging him with receiving and distributing child pornography. However, the government will be required to prove that the distribution was for the receipt or expected receipt of a thing of value other than pecuniary gain. The objection to ¶ 32 (sadistic and masochistic acts) will be heard. The objection to ¶ 33 (use of a computer) is denied, as a meaningful basis for the objection was not supplied. The objection to ¶ 34 (number of images) will be heard. The matters that must be proved are subject to the preponderance of the evidence standard. Thirty minutes are now allotted for sentencing; if counsel need more time they should immediately contact Edward Champion and reschedule this matter.

The Defendant's motion for variance (Filing No. 36) will be briefly heard at sentencing.

IT IS ORDERED:

1. The Defendant's objections to ¶¶ 31, 32, and 34 of the Revised PSR will be heard;
2. Otherwise, the Defendant's objections to the original or Revised PSR are denied;
3. If **any** party wishes to challenge these tentative findings, the party shall immediately file in the court file and serve upon opposing counsel and the Court a motion challenging these tentative findings, supported by (a) such evidentiary materials as are required (giving due regard to the requirements of the local rules of practice respecting the submission of evidentiary materials), (b) a brief as to the law, and (c) if an evidentiary

hearing is requested, a statement describing why an evidentiary hearing is necessary and an estimated length of time for the hearing;

4. Absent submission of the information required by paragraph 3 of this Order, my tentative findings may become final;

5. Unless otherwise ordered, any motion challenging these tentative findings shall be resolved at sentencing; and

6. The Defendant's motion for downward variance (Filing No. 36) will be briefly heard at sentencing.

DATED this 24th day of September, 2009.

BY THE COURT:

s/Laurie Smith Camp
United States District Judge